IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-839

EDMUND FOLEY, individually and on behalf of all other persons similarly situated,

Plaintiffs-Appellants,

—against—

WILLIAM G. CONNELIE, individually and in his capacity as Superintendent of the New York State Police, and S. A. SMITH, individually and in his capacity as Director of Personnel of the New York State Police,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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BRIEF FOR APPELLANTS

Opinion Below

The majority and dissenting opinions of the United States District Court are reported at 419 F. Supp. 889 (1976). (A copy is attached as Appendix A to the jurisdictional statement previously filed with this Court.)

Jurisdiction

Appellant's cause of action is based upon 42 U.S.C. § 1983. Appellant sought an order declaring the New York Executive Law § 215(3) prohibition of employing aliens with the New York State Police to be unconstitutional and enjoining its enforcement. The District Court had jurisdiction under 28 U.S.C. § 1343(3). Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202, and the three-judge court, convened under 28 U.S.C. §§ 2281 and 2284, is authorized to grant the injunctive relief sought by Appellant.

The judgment and order of the three-judge court was entered on September 1, 1976. A notice of appeal was filed on October 22, 1976. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253.

The Statutes Involved

The statutes involved in this suit are: New York Executive Law § 215(3), which provides in relevant part:

> No person shall be appointed to the New York state police force unless he shall be a citizen of the United States . . . New York Executive Law § 215(3) (McKinney Supp. 1975-76), and

The Fourteenth Amendment to the United States Constitution which provides in relevant part:

> . . . nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws. U.S. Const. Amend. 14.

Question Presented

Does the blanket exclusion of resident aliens from employment with the New York State Police deprive these persons of the equal protection of law guaranteed by the Fourteenth Amendment to the Constitution of the United States?

Statement of the Case

Appellant Edmund Foley is a citizen of the Republic of Ireland and an alien lawfully admitted for permanent residence in the United States. The Appellant has been a resident of the United States and the state of New York since February, 1973.

The Appellant filed an application for employment with the New York State Police in August, 1975. Shortly thereafter he received a letter from the State Police saying that his application was being rejected because he was not a citizen of the United States. Thereupon, the Appellant, through his attorney, wrote to the New York State Police, expressing his view that the decisions of this Court in *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), and *In re Griffiths*, 413 U.S. 717 (1973), prohibited New York State from discriminating against aliens in civil service employment, and suggesting that the New York State Police reverse their policy of discriminating against aliens. The State Police, relying on New York Executive Law § 215(3), declined to do so, and this action was commenced.

On September 19, 1975, the Honorable Milton Pollack entered an order permitting the Appellant to take the competitive examination for State Trooper to be held September 20, 1975, and to otherwise pursue his application for that position as if he were a citizen, subject to

the proviso that no rights would attach to the plaintiff should the defendants ultimately prevail on the merits. The parties subsequently stipulated that the action proceed as a class action and that a three-judge court be convened. On December 30, 1975, Judge Pollack entered an order certifying the Appellant as the representative of a class consisting of all permanent resident aliens who, but for the enforcement of New York Executive Law § 215(3), would otherwise be eligible to compete for employment in the competitive class for State Trooper, and requiring the convening of a three-judge court. The case was argued on April 15, 1976, and decision upholding the constitutionality of § 215(3) of the New York Executive Law was handed down in July, 1976, with the Honorable Walter R. Mansfield, United States Circuit Judge dissenting in a separate opinion. An order denying Appellant's motion for summary judgment was entered on September 1, 1976. The same order continued the stipulation under which the Appellant's application is being treated as if he were a citizen, pending a timely appeal to this Court. (A copy of the judgment and order is attached as Appendix B to the jurisdictional statement previously filed with this Court.)

A notice of appeal to this Court was filed on October 22, 1976, and Appellant's jurisdictional statement was filed on December 20, 1976. This Court noted probable jurisdiction on March 28, 1977.

Summary of Argument

The law is settled beyond doubt that an alien is a person within the meaning of the Fourteenth Amendment. The law is also clear that the status of alienage is a suspect classification and that a state seeking to use such a classification bears a heavy burden of justification. New York has not met that burden in this case to support their exclusion of non-citizens from the whole of New York State Police Force.

The District Court erroneously determined that the position of state trooper was one so close to the heart of representative government that the state's use of the alienage classification could be justified by a lesser showing. The exercise of discretion by individual state troopers does not anywhere near approach the high plane of policy-making envisioned by this Court when it suggested in *Sugarman* v. *Dougall*, *supra*, that a less strict standard of review might be appropriate. Regardless of the test applied, it is clear that the status of alienage bears not even a rational relationship to the achievement of the goals sought by the State. Thus the necessary connection between the use of the suspect classification and a compelling state interest has not been established. Furthermore, the classification employed by the state is overly broad. The means employed by the state do not necessarily achieve the ends proffered as justification. Furthermore, the state has constitutionally permissible means of achieving those ends.

The history of the Fourteenth Amendment establishes that it was designed, in part, to protect aliens from discrimination. This Court's history of interpretations gave concrete meaning to this constitutional command. These decisions came to recent fruition in *Sugarman* v. *Dougall* and in *In re Griffiths* which held that a state could not exclude aliens from public employment or the practice of law. Edmond Foley wants the public position of enforcing the law. The Court's decisions in these two cases, in particular, both singly and combined, guarantee him the constitutional right to do so.

It is significant to note that every other court that has considered this issue has reached a conclusion directly opposed to that reached by the majority court below. Circuit Judge Mansfield's dissent eloquently refuted the majority's argument and justifications for discrimination. The decision of the district court is thus clearly erroneous and should therefore be reversed.

ARGUMENT

I.

Introduction.

The Fourteenth Amendment of the United States Constitution reads in pertinent part that "[n]o State shall . . . deny to *any person* within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 2 (emphasis added). This Amendment originated as a joint resolution of Congress. When presenting it to the House on behalf of the Committee on Reconstruction, Mr. Howard of Michigan emphasized its broad reach:

> The last two clauses of the first section of the Amendment disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty or property without due process of law, or from denying to him the equal protection of the law. Cong. Globe, 39th Cong., 1st Sess. 2766 (1866).

After the Amendment had been ratified by the States, Congress reenacted the Civil Rights Act of 1866, 14 Stat. 27, in order to carry out the broad command of that Amendment. Civil Rights Act of 1870, 16 Stat. 144. In so doing, it changed the language of § 1 of the 1866 Act, which applied only to "all persons born in the United States and not subject to any foreign power," to "all persons within the jurisdiction of the United States." *Id.* § 16. *See Hurd* v. *Hodge*, 334 U.S. 24, 30-32 and n.7 (1948).

It is thus clear that aliens were among the intended beneficiaries of the Fourteenth Amendment, and this Court has consistently so held since 1886. *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

In *Yick Wo*, this Court struck down a San Francisco ordinance which had the effect of preventing Chinese from operating laundries. Although the Court's decision in that case firmly established that aliens were "persons" within the meaning of the Fourteenth Amendment, *id.* at 369, the next several decades did not see much advancement in the rights of aliens. Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 Duke L.J. 871, 873-74 [hereinafter *Employment Restrictions*]. The next important decision was *Truax* v. *Raich*, 239 U.S. 33 (1915), which struck down an Arizona statute restricting the employment of aliens in that state. In the course of the *Truax* opinion, Mr. Justice Hughes observed that the Fourteenth Amendment guaranteed the alien "the right to work for a living in the common occupations of the community." *Id.* at 41.

In *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948) the Court struck down a California statute restricting the right of certain resident aliens to fish in California waters. Noting that state imposed restrictions on the employment of aliens conflicted not only with the Fourteenth Amendment but also with the federal government's plenary powers over immigration and naturalization, the Court held that "the power of a state to apply its laws exclusively to its alien inhabitants [was] confined within narrow limits." *Id.* at 420.

In *Takahashi*, this Court enunciated the "general policy that all persons lawfully in this country shall abide 'in any

state' on an equality of legal privileges with all citizens under non-discriminatory laws." *Id.* Although the "policy" had been existent for over a century, it was not until the decision of this Court in the companion cases of *Graham* v. *Richardson* and *Sailer* v. *Leger*, 403 U.S. 365 (1971), that the full intentions of the framers of the Fourteenth Amendment reached the full dimensions of judicial application. In striking down durational residency and citizenship requirements for governmentally funded benefit programs, this Court held that:

> classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny. Aliens as a class are a prime example of a 'discrete and insular' minority . . . for whom such heightened judicial solicitude is appropriate.

Id. at 372 (footnotes omitted). The holding in *Graham* has since been reaffirmed by this Court several times. New York's statutory exclusion of aliens from all positions in the competitive civil service was invalidated, *Sugarman* v. *Dougall*, 413 U.S. 634 (1973), and a Connecticut rule which prevented aliens from practicing law in that state was likewise struck down. *In re Griffiths*, 413 U.S. 717 (1973). Last term a Puerto Rico statute which restricted engineering licenses to citizens was struck down, *Examining Board of Engineers* v. *de Otero*, 426 U.S. 572 (1976). In recent years, almost every court that has considered the issue has found state regulations which discriminate against aliens in employment and employment opportunities invalid. For a collection of the cases, see Comment, *Aliens' Right to Work: State and Federal Discrimination*, 45 Fordham L.Rev. 835, 838-39 and nn. 31-32 (1977) [hereinafter *Aliens' Right to Work*]. Indeed, the case at bar has the distinction

of being the only one where a state imposed restriction on employment opportunities was upheld. *Id.*

There are sound policy reasons for this set of overwhelming precedents. As this Court noted in *Graham*, aliens, like citizens, pay taxes, serve in the armed forces, and may reside in a state for many years, work in the state, and contribute in myriad ways to the cultural and financial growth and well-being of the state. 403 U.S. at 376. Therefore, as the courts considering this situation conclude, "any classification which treats all aliens as undeserving and all United States citizens as deserving rests upon a very questionable basis." *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972). The barriers erected by state legislatures against aliens violate this democracy's basic constitutional policy of awarding benefits on the basis of individual merit and imposing burdens according to individual wrongdoing. See Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1099 (1974). It is against this background that the unique decision in *Foley* v. *Connelie*, 419 F.Supp. 889 (S.D.N.Y. 1976) (three-judge court), must be considered and reversed.

II.

The Compelling State Interest Test is the Appropriate Test.

A. Statement of the Test

In order to justify its discrimination on the basis of alienage, the burden is on New York "to show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safe-

guarding of its interest." *In re Griffiths*, 413 U.S. at 721-22 (footnotes omitted). It is clear that in this case New York has not met its "heavy burden of justification." *McLaughlin* v. *Florida*, 379 U.S. 184, 196 (1964).

The District Court found the substantial and compelling state interest to be "the maintenance of public order to effect the preservation of the political structure including the prevention, detection and prosecution of crime." 419 F.Supp. at 898, App. A 37-38. The Appellant challenges neither the substantiality nor the permissibility of this interest. However, the exclusion of all aliens from all positions within the State Police does not further this goal; indeed, the exclusion may well hamper the State in the achievement of its purpose. As is set forth in detail below, there are less restrictive, constitutionally permissible means available to the State which are better suited to the achievement of the asserted purpose.

B. The Position of State Trooper Is Not One Which Warrants a Less Strict Scrutiny

Graham v. *Richardson* and *In re Griffiths* establish that because alienage is a "suspect class," any state laws which discriminate on that basis must be subject to strict judicial scrutiny. In a general discussion of the subject in the *Sugarman* opinion, however, this Court suggested its scrutiny would be less strict when considering the power of a State to establish the qualifications for "persons holding state elective or important non-elective executive, legislative, and judicial positions, for officers who participate directly in the formulation, execution or review of *broad* public policy perform functions that go to the heart of representative government." 413 U.S. at 647 (emphasis added). The District Court concluded that the position of State Trooper falls within this language, 419 F. Supp. at

895, App. A 24, and therefore required only a rational basis for the discrimination (the Court did, without explanation, also find that the compelling interest test was met). *Id.*, App. A 24-A 25. We respectfully disagree. The class of positions to which this exception applies must clearly be a narrow one.

Discrimination against aliens, where justified, must be founded on the narrow basis of the state's power to establish the qualifications for persons who make high level policy decisions, *i.e.*, those persons who are within the "political community" of the state. A careful analysis of the decision-making function exercised by the vast majority of state policemen makes it clear that they do not fall within this class. *See Chavez-Salido* v. *Cabell*, 427 F. Supp. 158, 169-72 (C.D. Cal. 1977) (three-judge court); 419 F. Supp. at 900-02, App. A 47-54 (Mansfield, J., dissenting).

The nature of the *Sugarman* recognition of a legitimate state interest is based upon political functions. "Voting and legislating are paradigmatic examples of participation in a political community. . . ." *Id.* Executive officers who "inevitably and properly act 'politically,'" *id.* (App. A 50) are also included within the range of the *Sugarman* language. The justification for creating this narrow exception to the heavy burden borne by an invidiously discriminating state, *Graham* v. *Richardson*, 403 U.S. 365 (1971), is the inherent power of the state "to preserve the basic conception of a political community." *Dunn* v. *Blumstein*, 405 U.S. 330, 344 (1972). Basic policy choices are appropriately made by public officers, both elected and non-elected, and only in this narrow area may citizenship requirements bear upon qualifications for the position.

The New York State Police force affirms that it operates as "a para-military organization." Connelie Affidavit (App. D 24). It selects its members on the basis of competitive

examination. *Id.* (App. D 33); New York Executive Law § 215(3) (McKinney 1972). An applicant's "fitness and good moral character" is required to be shown, in addition to the physical and mental examination. *Id.* After admission, troopers are educated and trained by the State. New York provides for a state police academy, employs officers specifically assigned to training, and assigns a salary at the training rate for troopers. *Id.* § 215(1), (2) (McKinney 1972).

As a "semi-military organization," 9A N.Y.C.R.R. §478.7, the New York State Police is a military hierarchy with strict accountability to superiors and with the sanction of disciplinary action for failure to comply with orders, "rules, regulations or instructions." The control of individual troopers is exercised at all times. Prior rules and regulations detail policy and outline the responsibilities of officers. Superior officers exercise authority contemporaneous to the officer's activity, limiting its scope, and precluding too broad a leeway for individual discretion. Subsequent disciplinary procedures, or simple review of police actions also limit the power of the individual officers.

There well may be some "limited, interstitial policy making," but it does not, as Circuit Judge Mansfield emphasized, remotely approach the level where it may be considered to be at "the heart of representative government." 419 F. Supp. at 901, App. A 52.* The reality of the limited exercise of police discretion is neither a relevant, nor a

* Influential analyses of the nature of police discretion have emphasized the importance of recognizing its existence in order that it might be structured and controlled by recognized procedures. *See* American Bar Association Standards Relating to the Urban Police Function, Standards 4.2, 4.3 (1973); K. Davis, Police Discretion 98-103 (1975). No serious commentator has advocated broad discretionary authority residing in individual officers, since it would be antithetical to democratic philosophy and traditions.

sufficient basis for classifying a state trooper as "so close to the core of the political process as to make him formulator of government policy." *In re Griffith*, 413 U.S. 717, 729 (1973). In fact, detailed statements of government policy surround the police officer, in the form of penal statutes, judicial decisions, administrative regulations, and written as well as oral orders from superiors. Those areas in which some discretion is exercised are often social and familial, and state interests are not at all advanced by a broad disqualification of aliens. *See* Vandall, *Training to Meet the Police Function*, 1971 Wis. L. Rev. 547, 561-63. State troopers' decisions in these instances are personal decisions, not political ones. The troopers may treat crises within a narrow spectrum, but they are not engaged in prior decision-making. Their function is to react to situations, not to formulate policy. The officer's duties are circumscribed by articulated policy and enforced by paramilitary discipline. Their discretion when utilized involves the application of factual judgments, *not* political or policy judgments; they apply the law's requirements to their perceptual judgments. The discretion exercised is thus much less than that exercised by lawyers and other aliens in public employment and at a lower policy level. *See* Connelie Affidavit, ¶ 8, App. D 28.

The limitations on the activity of individual state troopers effectively preclude the application of the rationale of *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976). No more extreme contrast to the individual state trooper could be devised than the individual juror. The jury presents "perhaps the most secret form of decision-making in the nation." *Id.* at 138 As an element in our system of goverment, the jury is the prime example of a non-bureaucratic institution. It is temporary, not permanent. *See Aliens' Right to Work*, 45

Ford. L. Rev. at 844-45. There is no system of reward and punishment based upon performance of the task assigned. *See Bushell's Case*, 124 Eng. Rep. 1006 (1670). Relations within the jury are quintessentially democratic: jurors select their foreman, and reach decisions by unanimous or majority vote. *See Apodaca* v. *Oregon*, 406 U.S. 404 (1972). At least with criminal juries, their group decisions are autonomous, except of course that the trial judge may overturn verdicts of guilt.

The jury is a unique decision-maker, central to the United States form of government; it is specially enshrined in the Constitution. U.S. Const. Amends. VI, VII. It has always been considered at the heart of our system of government, "fundamental to the American scheme of justice." *Duncan* v. *Louisiana*, 391 U.S. 145, 149 (1968). It may be conceded that there is a valid governmental interest "in assuring that those who make *the ultimate factual decisions* on issues of personal liberty and property rights under our system of justice be either native born or naturalized citizens." *Perkins* v. *Smith*, 370 F.Supp. 134, 136 (D. Md. 1974), *aff'd* 426 U.S. 913 (1976) (emphasis added). Given this Court's rulings on the rights of aliens, however, it is clear error for the District Court to extend the same reasoning to a completely different category of public employment. "[J]uries are the final arbiters of truth and consequently of justice." *Id.* at 137. State troopers are not, are not intended to be, and should not be "final arbiters of truth." Again, the importance of state police officers is of a completely different nature: it is not "ultimate," it is not "fundamental to the American scheme of justice," with the same constitutional, traditional and political heritage. *See* 1 A. de Tocqueville, *Democracy in America* (Reed tr. 1961 ed.).

Juries have definitionally broad discretion, which is relatively uncontrolled, and is unimpeachable. The secrecy

of jury action is a hallmark of the institution, maintained both to protect litigants, and to preserve unfettered decisionmaking within the jury.

State troopers' decisions in these instances are personal decisions, not political ones. The troopers may treat crises within a narrow spectrum, but they are not engaged in prior decisionmaking. Their function is to react to situations, not to formulate policy. This secrecy, the absence of accountability, and the possibility of a severe obstruction or distortion of justice by just a single juror led the Court of Appeals for the Fifth Circuit to accept the rationale of *Perkins* v. *Smith*. *United States* v. *Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975). The Fifth Circuit held that the federal government was required to establish a compelling interest in order to justify confining the selection of jurors to citizens. *Id.* at 976. Federal authority to make the classifications was found to be more expansive than state authority. "Thus, while most *state* classifications based on aliens are inherently suspect, *Graham* v. *Richardson*, *In re Griffiths*, *Sugarman* v. *Dougall*, *Takahashi* v. *Fish and Game Comm'n*, *supra*, the same is not true of all such federal classifications where Congress' plenary authority in the field of immigration is involved." *Id.* at 977 (emphasis in original).

As Circuit Judge Mansfield pointed out in his dissent below, 419 F. Supp. at 904 n.3, jury selection procedures are both broader and more individualized than those for state troopers. New York Judiciary Law §§ 504, 596, 662 (McKinney 1975). Broad criteria of residence, age and mental ability supplement a citizenship requirement. Beyond these broad guidelines, selection of individual petit jurors is "expedited", and trial attorneys argue for exclusion for cause, *i.e.* based upon a finding that the juror would be unable to decide the case fairly, or challenge

peremptorily, for reasons which need not be articulated. *See* F.R. Crim. P., Rule 24; *Swain* v. *Alabama*, 380 U.S. 202 (1965). The nature of broader guidelines may be justified by the jury's functions and position in the system of justice. Selection of state troopers can be more selective, since it applies only to those who willingly request appointment, and because there must be individual judgments of fitness and character. At the same time, selection must be made on the basis of rational, defensible criteria, and cannot be the subject of an inarticulated prerogative such as the peremptory challenge.

C. The State's Discrimination Cannot Be Justified By Any Rational Basis Which May Be Conceived

Even if this Court concludes that the position of state trooper is one which involves so high a level of policy making that a lesser scrutiny is required, it does not follow that the exclusion of all aliens from that position is *ipso facto* constitutional. The *Sugarman* opinion explicitly recognized that such state action is still subject to judicial scrutiny, although under a standard less strict than the "compelling state interest" test. 413 U.S. at 648.

Under traditional equal protection analysis, if the "compelling state interest" test is inapplicable, the statute at issue must be tested under the "rational relationship" test. This test requires, at a minimum, that the statutory classification bear some rational relationship to a legitimate state purpose. In a recent discussion of the test, this Court noted that more might be required without reaching the "most exacting scrutiny" of the compelling state interest test:

> Though the latitude given the state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a 'stricter' scrutiny . . .

Trimble v. *Gordon*, —— U.S.——, 45 U.S.L.W. 4395, 4396 (Apr. 26, 1977), citing *Weber* v. *Aetna Casualty & Surety Co.*, 406 U.S. 164, 172 (1972).

Both *Trimble* and *Weber* dealt with classifications based on illegitimacy. Classifications based on illegitimacy, like those based on alienage, create constitutional problems because they grant or deny benefits on the basis of characteristics which have nothing to do with a particular individual's qualifications* for the benefit at issue. Thus, while refusing to label illegitimates a "suspect class," *Trimble* v. *Gordon*, 45 U.S.L.W. at 4396, this Court has nevertheless consistently struck down statutes which erected presumptions denying illegitimates the opportunity to establish the facts which would have entitled them to benefits. *See, e.g., Trimble* v. *Gordon, supra; Jimenez* v. *Weinberger*, 417 U.S. 628 (1974); *Levy* v. *Louisiana*, 391 U.S. 68 (1968). Laws such as the one here at issue, which conclusively deny all aliens the opportunity to participate in a significant aspect of governmental service, regardless of that alien's qualifications, contributions to the community and commitment to the public good, likewise ought not to be upheld, at least in the absence of a showing by the State of a factually demonstrable connection between the interests asserted by the State and the restrictions imposed. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L. J. 1071, 1082 (1974).

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* A further analogy between aliens and illegitimates exists with regard to those permanent resident aliens, who, like Mr. Foley, have not been here long enough to qualify for naturalization, *see* 8 U.S.C. §1427(a)(1), and for whom the status of alienage, like the status of illegitimacy, is not a matter of personal choice.

New York's statutory exclusion of all aliens from all positions within the State Police force cannot survive this test, for as Judge Mansfield noted in his dissent below:

> There is not a shred of evidence in the record of this case to indicate, much less prove, that a properly tested, selected and trained resident alien would be less competent than a citizen to perform the duties of a New York state trooper, which admittedly are paramilitary in nature, or that members of the plaintiff class would present a poorer security risk or be less loyal to the State than citizens in the performance of those duties.

419 F.Supp. at 899, App. A42.

Indeed, New York has not even met its burdens under the mir num requirements of the rational relationship test, for, as we will now demonstrate, the statutory exclusion of all aliens from the State Police completely lacks a rational basis in logic or in fact, and the means employed by the State are not "precisely drawn in light of the acknowledged purpose." *Sugarman*, 413 U.S. at 643.

III.

New York's Statutory Exclusion of Aliens Cannot Be Sustained Under Any Standard of Review.

To avoid duplication of analysis under the possible tests, we address the arguments advanced by the District Court and the State of New York to justify the statutory exclusion of all aliens from the State Police in this one section. As will be shown, this statute cannot survive scrutiny under even the minimal requirements of the "rational relationship test." The exclusion of aliens in no way furthers the interests of the State supposedly at stake here under any of

the theories advanced in the court below. *A fortiori*, the necessary connection which stricter scrutiny requires between the exclusion and the protected interest has not been established. In fact the means chosen by the State to advance its interests actually may serve to defeat those interests. Further, the means chosen are not precisely drawn in light of the acknowledged purpose, *Sugarman* v. *Dougall*, 413 U.S. at 643, and, finally, there are constitutionally permissible less restrictive means available to the state which better serve the ends sought. *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

A. The Arguments Advanced By the State Bear No Rational Relationship to the Ends Asserted

1. *Knowledge and familiarity with the law*

The District Court supported its conclusion with the observation that state troopers have the duty of preserving and protecting the constitutional rights of all persons within New York State and that this duty is largely exercised without supervision. 419 F.Supp. at 895, App. at A24. The District Court, without explaining why, then stated that "this is a situation where citizenship bears a vital and essential relationship to the proper performance of the duties of a state trooper." *Id.* The analogy to the legal profession would seem compelling here: certainly an attorney is required to be as familiar with constitutional rights and the applicable laws and regulations as is a state policeman, and it is fair to assume that the obligations in this regard with respect to an attorney are generally greater than those imposed upon policemen. Courts which have considered the issue have found no relationship between the fact of citizenship and an applicant's knowledge of local custom or law. *See, e.g., In Re Griffiths*, 413 U.S. 717, 725 (1973); *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 296, 496

P.2d 1264, 1270, 101 Cal. Rptr. 896, 902 (1972); *Application of Park*, 484 P.2d 690, 692 (Alaska 1971). See also Note, *Aliens' Right to Work: State and Federal Discrimination*, 45 Ford. L.R. 835, 844 and n. 74 (1977). In *Rafaelli, supra*, the California Supreme Court observed that "[k]nowledge of this type is acquired in many ways, both formal and informal. It comes not so much from the accident of birth as from the experience of the daily life of the community and the role of government in that life." 7 Cal. 3d at 296, 496 P.2d at 1270, 101 Cal. Rptr. at 902. And, in a related context, the late Judge Craven observed that:

> [N]either legal competence nor ethical fitness depends upon cultural provincialism. Assuming that knowledge of local government, a permanent stake in the community, and good character are desirable and important qualifications for the competent legal practitioner, we do not agree that one year's residence is in any way relevant to a determination that these qualities are present in a particular individual. Too often, even lifelong residents of a community have no knowledge of even the basic rudiments of the governmental units closest at hand. *Keenan* v. *Board of Law Examiners*, 317 F. Supp. 1350, 1359 (E.D.N.C. 1970) (three-judge court) (footnote omitted).

2. *Personal Commitment to the Laws*

In an argument closely allied to that of the State's "loyalty" argument, the District Court also attempted to establish the requisite nexus between citizenship and the position of State Trooper by claiming that the state trooper's highly sensitive and delicate role requires that a person be "personally committed" to the proper application and enforcement of the laws. 419 F. Supp. at 897, App. at A29. But, for reasons such as those expressed

above, alienage does not affect one's ability to make that commitment. Certainly, the District Court cannot be relying on the long-discredited notion that aliens as a group are inherently more prone to commit crime than citizens. *Compare In re Ramirez*, 193 Cal. 633, 650, 226 P. 914, 921 (1924) *with Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496, P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972). Furthermore, it is clear that alienage does not prevent a person from subscribing to an oath. In the *Griffiths* opinion, this Court explicitly rejected the contention "that only citizens can in good conscience take an oath to support the Constitution." 413 U.S. at 726 n. 18. The Court noted that all persons inducted into the armed services are required to take such an oath, citizen and alien alike, and thus saw no reason why an alien attorney could not subscribe in good faith to such an oath. *Id.* Similarly, an alien state trooper could make a good faith pledge of his personal commitment to uphold and to enforce the laws of the United States and of New York State.

The District Court proffered *United States* v. *Gordon-Nikkar*, 518 F.2d 972 (5th Cir. 1975) and *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md. 1974) (three-judge court), *aff'd* 426 U.S. 913 (1976), as purported authority. These cases, however, concerned the right of aliens to serve on grand and petit juries, which, as we demonstrate *supra*, is an entirely different situation, both in fact and in constitutional law.

The interests of the federal government in the personal commitment of its soldiers to its laws and ideals cannot be questioned, and is certainly at least as great as the interest of the State in the same commitment by its policemen. If the federal government can rely on such an oath, particularly from alien draftees who have no choice but to subscribe to it or to return to their native countries, the

State can certainly rely on it for those aliens who affirmatively demonstrated such a commitment by their act of seeking employment with the State Police.

As with *In re Griffiths*, 413 U.S. 717 (1973), the sole basis for disqualification in the instant case is appellant's status as a resident alien. *Id.* at 723. Here, as in *Griffiths*, "[i]t is undisputed that a State has a constitutionally permissible and substantial interest in determining whether an applicant [for admission to the Bar, or for appointment as a state trooper] possesses " 'the character and general fitness requisite for an attorney and counselor-at-law [or a state trooper].' " *Id.* at 722-23 (citations omitted). This Court held in *Griffiths* that a blanket exclusion of aliens is not a permissible means available to ease the state's responsibility in selecting its officers.

Without denigrating "a lawyer's high responsibilities," this Court in *Griffiths* invalidated the restriction based upon alienage alone. A wide variety of permissible methods may be used to determine fitness for state troopers, as for lawyers, as New York in fact does. State troopers are clearly not held to a higher duty, or are more intimately connected to the system of justice than are attorneys. No one can and, we trust, no one will suggest that state troopers are as advanced in the judicial and legal functions as lawyers, who as officers of the court are entrusted with semi-judicial operations, facilitating government and business operations, and informing tribunals.

Citizens arrest citizens; aliens can arrest aliens. Members of the same race arrest each other and can do so whether they are citizens or aliens. And aliens have no common "alien" interest or identity. The District Court erred, as Circuit Judge Mansfield pointed out, in upholding a blanket exclusion without "a shred of evidence in the

record" that non-citizen state troopers would be less competent or less loyal in the performance of their duties. 419 F. Supp. at 901 (Mansfield, J., dissenting); App. A 42.

One of the bases of Judge Winter's concurrence in the *Perkins* decision was that, although less drastic means were available to ensure proficiency in English and familiarity with laws and customs, there did not appear to be any guarantee of a juror's commitment to the upholding of the laws. Police experience far greater supervision in the performance of their duties than do jurors who are merely instructed. The affirmative act of applying for appointment as a trooper positively demonstrates acceptance of a pledge to uphold the law.* This pledge can be verified, and is verified for citizens, in a well-designed process of selection and training. See *Foley*, 419 F. Supp. at 904 n.3, App. A62 (Mansfield, J., dissenting). Unlike a juror's oath which is "virtually unenforceable," *Perkins* v. *Smith*, *supra*, 370 F. Supp. at 141 (Winters, J., concurring) state police officers are subject to prior examination, continuing supervision and subsequent review.

3. *Divided loyalties*

New York has sought to justify the exclusion of all aliens from its State Police force by speculating on the potential conflicts of loyalties which may arise for the alien State Trooper in the performance of his duties. Thus, the State argues that by the mere fact of his alienage, an alien can presumptively not be counted upon to protect foreign dignitaries at the 1980 Winter Olympics at Lake Placid, to assist in the arrest of aliens illegally in the country, or to investigate matters dealing with

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* The possibility of sabotage is so small that it cannot validate so broad an exclusion, and this danger can be eliminated by an individual determination. *In re Griffiths*, 413 U.S. at 726.

government security. 419 F. Supp. at 898, App. A36; Connelie Affidavit at ¶¶ 9-11, App. D28-30. This argument cannot withstand even a cursory analysis.

The federal government has seen fit to entrust its security to aliens as well as citizens. Permanent resident aliens of the United States not only have the opportunity to serve in the Armed Forces of this country, but they may be required to do so. *See* 50 U.S.C. App. §§ 453, 454(a); *Sugarman* v. *Dougall*, 413 U.S. at 645. The State may satisfy itself as to the loyalty of the alien to its constitution and laws by requiring him to subscribe to an oath. *In re Griffiths*, 413 U.S. at 726 n. 18. The argument of the State that the status of alienage creates a limbo of loyalty which the alien cannot overcome by personal choice is in square conflict with the holdings of this Court in *Sugarman* and *Griffiths* and must be rejected here. The personal commitment to the law of a person who is volunteering, by joining the Police Force, to put his life on the line for the sake of his adopted state, *see* Connelie Affidavit at ¶¶ 5, 9, App. D25-29, cannot be questioned by such arbitrary presumptions. Not only is such a presumption illogical, but it flies in the face of the contrary presumption created by the federal immigration laws. Those laws establish rigorous controls which prevent the admission into this country on any basis of any alien who might conceivably present a threat to this country or its institutions, 8 U.S.C. §§ 1182(a)(27)-(29), or who has at any time assisted or participated in any violation of the immigration laws. *Id.* (31). It is clear that the federal government possesses and exercises plenary power over immigration to the exclusion of similar exercises of control by the states. *Hines* v. *Davidowitz*, 312 U.S. 52 (1941).

4. *Commitment to community*

The status of citizenship is, as this Court has often noted, irrelevant in determining a person's membership in or commitment to a community. "Resident aliens, like citizens, pay taxes, support the economy, serve in the armed forces, and contribute in myriad other ways to our society." *In re Griffiths*, 413 U.S. at 722. As several courts have observed, the alien may have lived in the state for many years, "demonstrated his worth as a constructive human being, and contributed much to the growth and development of the state." *Herriott* v. *City of Seattle*, 81 Wash. 2d 48, 60, 500 P.2d 101, 109 (1971); *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 582, 456 P.2d 645, 656, 79 Cal. Rptr. 77, 88 (1969). The citizen, on the other hand, may be a relative newcomer to the state who has little "stake" in the community, *id.*, and who may move on at a moment's notice.

An alien applicant may thus be more familiar with the laws and customs of the United States than the citizen applicant, may have resided in the state longer, made more of a contribution to it, and have demonstrated more of a commitment to it. An alien may take an oath to support the laws and constitutions of the United States and of the State in which he resides. *In re Griffiths*, 413 U.S. at 724 n. 8. Thus the difference between the naturalized citizen eligible for appointment and the alien who is ineligible could merely by the experience of participation in the formal ceremony which occurs in naturalization court. Note, *California Exclusion of Permanent Resident Aliens from Appointive Public Office*, 11 Cal. Western L. Rev. 117, 122 (1974). The differences between a citizen and an alien likewise have no bearing on commitment. A person born in the United States of foreign parents could spend twenty years overseas, and be

eligible for appointment. An alien could spend the same time growing up in the United States and be ineligible.

It is undisputed that the federal government has broad authority to set the terms and conditions of naturalization. U.S. Const., Art. I, § 8, cl. 4. Thus the federal government need not deem relevant for the purpose of naturalization aspects of an alien's background and community standing, and, therefore, "[t]he grounds employed by [nations] in making their characterizations of 'nationality'" may ignore or bear only incidental relationship to the facts of community membership. *See* McDougal, Laswell & Chen, *The Protection of Aliens from Discrimination and World Public Order: Responsibility of States Conjoined with Human Rights*, 70 Am. J. Int'l L. 432, 439 (1976). A state, on the other hand, may not stand in the shoes of the federal government in this regard. Mr. Foley has not yet been in the United States for five years, and is thus not yet eligible for naturalization.* 8 U.S.C. § 1427(a)(1) (1970). The conclusive presumption made by Executive Law § 215(3) that this fact makes Appellant insufficiently committed to the proper application of the law and the survival of the state reflects the utmost arbitrariness. McDougal, *et al.*, *supra*, 70 Am. J. Int'l L. at 439 n. 38. As the Supreme Courts of both Washington and California have observed, "any classification which treats all aliens as undeserving and all citizens of the United States as deserving rests upon a very questionable basis." *Rafaelli* v. *Committee of Bar Examiners*, 7 Cal. 3d 288, 298, 496 P.2d 1264, 1271, 101 Cal. Rptr. 896, 903 (1972); *Herriott* v. *City of Seattle*, 81 Wash. 2d 48, 60, 500 P.2d 101, 109 (1971).

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* By the time Mr. Foley meets the five year residency requirement for naturalization, he will be too old to apply for the position of State Trooper.

Furthermore, it is clear after *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948), that a State may not rely on the distinctions made in federal immigration law to justify arbitrary discrimination. California had enacted a law precluding only those resident aliens ineligible for citizenship from fishing in California waters. In striking down the law as violative of equal protection, this Court made the following disposition.

> All of the foregoing [a discussion of the applicability of the Fourteenth Amendment and the Civil Rights Acts to aliens] emphasizes the tenuousness of the state's claim that it has power to single out and ban its lawful alien inhabitants, and particularly certain racial and color groups within this class of inhabitants, from following a vocation simply because Congress has put some such groups in special classifications in exercise of its broad and wholly distinguishable powers over immigration and naturalization.

Id. at 420.

5. *Alien images*

New York further argues that it has a right to conduct its sovereign affairs through the agency of its citizens. Connelie Affidavit, ¶6, App. D 25-26. But see *In re Griffiths*, *supra*, for officers of the court conducting its affairs. If the issue is image, it is difficult to see how the person in contact with the State Trooper will be aware of the latter's citizenship, and it is even harder to see how this is crucial to the preservation of the political structure. The argument is little more than a variation on the "special public interest" doctrine explicitly rejected in *Sugarman*, 413 U.S. at 644-45. It is thus a patently insufficient justification for the employment of a suspect classification.

6. *Absence of any conceivable basis*

Finally, it is worth noting in passing, that the State has never attempted any showing of what actually motivated the legislature to include the citizenship requirement when it enacted what is now Executive Law §215(3) in 1927. The law was enacted at a time when the states generally were enacting laws which discriminated against aliens, Rosales, *Resident Aliens and the Right to Work: The Quest for Equal Protection*, 2 Hastings Const. L.Q. 1029, 1036-46 (1975); *Employment Restrictions*, *supra*, 1974 Duke L.J. at 871-76, and when the now-discredited "special public interest" justification of *Crane* v. *New York*, 239 U.S. 195 (1915) and *Heim* v. *McCall*, 239 U.S. 175 (1915) was in vogue. See *Sugarman*, 413 U.S. at 643-45. In order to justify discrimination against aliens, the State must show more than "any conceivable basis" which might justify the exclusion. In *Hampton* v. *Mow Sung Wong*, in which the rational relationship test was applied to the exclusion of aliens from federal civil service positions, this Court criticized the use of "hypothetical" justifications. 426 U.S. 88, 116, 48 L.Ed.2d 495, 516 (1976). While the "any conceivable basis" test might have been considered an appropriate standard in commercial and tax matters, *Trimble* v. *Gordon*, 45 U.S.L.W. at 4396; Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral and Permissive Classifications*, 62 Geo. L.J. 1071, 1073 (1974), it has never been and will never be an appropriate standard for laws which discriminate on the basis of alienage. Such discrimination on the basis of class membership violates the basic constitutional policy of allocating benefits on the basis of individual merit; to validate such discrimination on the basis of mere hypotheses, which is certainly all that the State has offered here, is to give state legislatures a *carte blanche* to discriminate. *See id.* at 1099.

B. The Exclusion of Aliens From the State Police Actually Impairs the Effectiveness of That Force and the Stability of the Community

It is a well-established principle that "reasonable classification implies action consistent with the legitimate interests of the state." *Truax* v. *Raich*, 239 U.S. 33, 42 (1915). Far from serving the interests of the State in the maintenance of public order, the exclusion of aliens from the State Police may seriously hamper the effectiveness of that body in the performance of its duties. In a report entitled "Policed by the White Male Minority" (October 1976), the Florida Advisory Committee to the United States Commission on Civil Rights strongly condemned Florida's statutory exclusion of aliens from police forces.* The Committee noted that Florida, like New York, has a very large population of resident aliens, and found the citizenship requirement a hardship both for the alien community and for the police who must serve and protect these people of another culture and language. *Id.* at 22. The absence of members of this significant community in the police force of the State could easily lead to a breakdown in communication resulting in serious disorders. The importance of mutual understanding and communication between the police and the communities they serve cannot be gainsaid. The Florida Committee concluded that " . . . the employment of resident aliens by the Miami Police Department in proportions approximating their presence in their respective ethnic population in the city would be a positive factor in developing and maintaining healthy police-community relations in Miami." *Id.* at 72.**

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* Fla. Stat. Ann. §943.13 (Supp. 1976).

** The Committee had previously expressed its own doubts as to the constitutionality of Florida's exclusion of aliens from its police

The imposition of a citizenship requirement in this context could likewise defeat the purpose asserted by the State here in a second way. Presumably, the job of state trooper will be best performed by the persons most highly qualified, and to the extent that that person is an alien and excluded by § 215(3) of the Executive Law from that position, a less qualified person will fill the position. Note, *California Exclusion of Permanent Resident Aliens from Appointive Public Office*, 11 CALIF. W. L. REV. 117, 132 and n. 122 (1975). Thus, the "questionable basis" of such a provision which treats all citizens as deserving and all non-citizens as undeserving is underscored. *Purdy & Fitzpatrick* v. *State*, 71 Cal. 2d 566, 582, 456 P.2d 645, 656, 79 Cal. Rptr. 77, 88 (1969). Such a rule offends traditional notions of equal protection by excluding those more familiar with laws and customs and including those who are less familiar. Knoppke-Wetzel, *Employment Restrictions and the Practice of Law by Aliens in the United States and Abroad*, 1974 DUKE L.J. 871, 903-04. The State's interest can be better served by the testing of the individual applicant's understanding and knowledge of the laws in question, as is now done for all applicants. *In re Griffiths*, 413 U.S. at 725.

C. New York Statutory Exclusion of Aliens Is Not "Precisely Drawn" In Light of Its Acknowledged Purpose

In its discussion of the application of strict judicial scrutiny in *Sugarman*, this Court observed that a state's power "to apply its laws exclusively to its alien inhabitants as a class [was] confined with narrow limits." *Takahashi*, 334 U.S. at 420, and that therefore the Court must look "to the

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forces, *id.* at 71-72, 84-85, and recommended that the United States Department of Justice be urged to "consider the advisability of challenging the statute in the appropriate federal district court." *Id.* at 72, 85.

narrowness of the limits within which the discrimination is confined." 413 U.S. at 642. That obligation extends as well to statutes through which the State seeks to "define its political community [for] in seeking to achieve this substantial purpose, with discrimination against aliens, the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 643.

In *Sugarman*, the Court observed that the statute at issue, § 53 of the New York Civil Service Law, applied to the sanitation man, class B, as well as to the person who might formulate important public policy. In view of the wide sweep and imprecision of the statutory exclusion, this Court concluded that the ban on aliens could not stand. *Id.*

The same result is compelled in the instant case. The flat prohibition of New York Executive Law § 215(3) extends from troopers to deputy superintendents. Connelie Affidavit ¶ 14, App. D32-33. The duties performed by these officers range from searching for missing persons and issuing traffic summonses, *id.* at ¶ 8, App. D27-28, to the determination of priorities in the enforcement of laws and the command of Troops. *Id.* at ¶ 14, App. D32-33.

New York seeks to justify this broad discrimination on the grounds that all state troopers, by enforcing the laws of the State, "perform functions which go to the heart of representative government." 419 F. Supp. at 895, App. A24. Assuming *arguendo* that the tasks performed by some of the higher-ranking members of the force may reach the plane of political decision-making envisioned by this Court in *Sugarman*, then for those persons, a narrowly drawn citizenship requirement may be valid. However, in *Chavez-Salido* v. *Cabell*, 427 F. Supp. 158 (C.D. Cal. 1977), a three-judge court unanimously invalidated California Government Code § 1031(a) both on its face and as applied to the position of Deputy Probation Officer. The invalidated law

required all "peace officers" to be citizens of the United States. In striking it down, the court suggested, without reaching the issue, that California might "constitutionally enact a citizenship requirement for a narrowly confined class of the most important peace officers," * such as county sheriffs or city police chiefs. *Id.* at 171 n.24. Because the citizenship requirement of Executive Law § 215(3) is not confined to such positions, it is not "precisely drawn in light of the acknowledged purpose" and consequently violates the equal protection guarantee of the Fourteenth Amendment. *Sugarman,* 413 U.S. at 643. The issue of whether citizenship is an available requisite for a state to impose for a high-ranking policy-maker in the state police department is therefore not before the Court.

D. The Ends Sought by the State May be Achieved by Constitutionally Permissible Means

It is a settled principle of constitutional law that a State may not employ a constitutionally suspect classification when the end sought to be achieved by the State may be achieved by less restrictive means. *See, e.g., Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960). As we have indicated above, the State's interest in the lolyalty of its state troopers may be assured by a loyalty oath. The State's interest in its state trooper's knowledge and understanding of the law may be ensured by the extensive testing and training to which state troopers are already subjected. Likewise,

* This distinction between upper-echelon policy-making and the actions of individual police officers was implicitly recognized by this Court in *Rizzo* v. *Goode,* 423 U.S. 362 (1976). In that opinion, *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966) and *Hague* v. *C.I.O.,* 307 U.S. 496 (1939) were distinguished on the grounds that the constitutional wrongs complained of in those cases were the result of policy decisions made by high-ranking local officials. In *Rizzo,* the alleged constitutional violations were attributed to individual police officers and not to any official policy of the police chief. 423 U.S. at 373 n.8.

the State's concern for the proper exercise of discretion by its officers may be better ensured by thorough and comprehensive training and the appropriate supervision in this "para-military" organization.

CONCLUSION

New York's statutory exclusion of aliens from the State Police force is one last relic of a bygone era of baseless discrimination against aliens. As the Washington Supreme Court noted, "[w]e have long since passed that time in history when resident aliens of Boston were met with signs which read: 'Help wanted—Irish need not apply here for work!'" *Herriott* v. *City of Seattle,* 81 P.2d 42, 60, 500 P.2d 101, 109 (1971).

For the foregoing reasons, we respectfully request that this Court reverse the decision of the District Court.

Dated: New York, New York
June 9, 1977

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